Our ref: FOI-2023-10086

17 October 2023

External Discloser
By email only

Dear Discloser,

Freedom of Information request – internal review decision

1. I refer to your request for internal review of Ms Hanlon's decision to provide access to one document in relation to your FOI request of 23 August 2023.
2. I am an officer authorised under section 23(1) of the FOI Act to make internal review decisions in relation to FOI requests.

Summary

3. Your FOI request was expressed in the following terms:

> ***Part A***
> *[35] Under the Freedom of Information Act 1982(Cth), I request access to the "advice" sought "from the APSC in its capacity as the agency with policy responsibility in this area" effectively providing that where a candidate for a role in the Australian Public Service does not have the essential qualifications and experience for a role but "signals", in a job application, that he or she may soon attain the qualifications and build up the relevant experience, members of a selection committee who select the candidate without the essential qualifications and experience ahead of dozens of candidates who do, in fact, meet the essential qualifications and experience for the role at the time the selection decision is made will not contravene their legislative duty to at all times behave in a way that upholds the APS Employment Principles enshrined in section 10A of the Public Service Act 1999 (Cth) (especially the merit selection principles articulated in subsection 10A(2) of the Public Service Act 1999 (Cth)): see Public Service Act 1999(Cth), s 13(11)(a).*
> ***Part B***
> *[36] Under the Freedom of Information Act 1982 (Cth), I request access to any and all documents (including, but not limited to, policy documents, policy guidance, guidelines, directions, instructions issued by Commissioners etc) recording that it is permissible for a member of a selection committee for a role in the Australian Public Service to provide one of the candidates for a role, who has not attained the essential qualifications or experience for that role, with a contract of employment 28 days before the selection process has even been finalised.*

4. As outlined in the notification of decision of 19 September 2023, Ms Hanlon identified a total of one document within the scope of your request. In her decision letter, she notified you that you had been granted partial access to that document.

5. On 19 September 2023, our Office received your request for internal review of Ms Hanlon's decision. In essence, you submit that the document identified by Ms Hanlon does not fall within the scope of either Part A or Part B of your request. In addition, you have sought clarification as to what parts of the document fall within the exemptions claimed.

Decision summary

6. I have considered the information provided by you in your emails of 19 September and 10 October in relation to this review.
7. I have considered Ms Hanlon's decision. I note the FOI Guidelines at [3.110]. Agencies are encouraged not to take a narrow or pedantic approach to FOI applications. However, having considered your emails of 19 October and 10 October, I am satisfied that, in this instance, it is preferable to take a narrower construction of Part A and Part B of the request. If I am to closely consider each element of both Part A and Part B, I am satisfied that, in relation to Part A, no such 'advice' is within the Office's possession, and in relation to Part B, there are no such documents within the Office's possession.
8. In considering whether all reasonable steps have been taken to locate the document, I have considered:
    a. The subject matter of the document requested
    b. The file management systems in place
    c. The view of individuals and line areas within the Office who were able to assist
9. I am satisfied that all reasonable steps have been taken to locate the documents sought and that the documents do not exist. I therefore refuse access to the documents pursuant to section 24A of the FOI Act.
10. As there are no documents within the scope of your request, it is not necessary for me to consider the appropriateness of the redactions made by Ms Hanlon.

Material taken into account

11. I have taken the following material into account in making my review decision:
    a. Your application for internal review as well as your subsequent email of 10 October.
    b. The scope of your FOI request, in particular in relation to your clarifying emails of 19 September and 10 October.
    c. Relevant provisions of the FOI Act.
    d. The Guidelines issued by the Office of Australian Information Commissioner under s 93A of the FOI Act.

Review rights

12. You have the right to seek Information Commissioner (IC) review of this decision. An application for IC review must be made in writing within 60 days of the decision.
13. If you are not satisfied with the way we have handled your FOI request, you can lodge a complaint with the OAIC. However, the OAIC suggests that complaints are made to the agency in the first instance.
14. While there is no particular form required to make a complaint to the OAIC, the complaint should be in writing and set out the reasons for why you are dissatisfied with the way your request was processed. It should also identify the Ombudsman's Office as the agency about which you are complaining.

15. You can make an IC review application or make an FOI complaint in one of the following ways:
    a. online at https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/
    b. via email to foidr@oaic.gov.au
    c. by mail to GPO Box 5218 Sydney NSW 2001, or
    d. by fax to 02 9284 9666.
16. More information about the Information Commissioner reviews and complaints is available at its website: www.oaic.gov.au/freedom-of-information/foi-review-process.

Yours sincerely,

Amelia McCormick
Legal Director

Influencing systemic improvement in public administration

COMMONWEALTH OMBUDSMAN

Our ref: FOI-2023-10086

19 September 2023

Emailed to: [redacted]

Dear External Discloser

Freedom of Information request – Part access decision

I refer to your request of 23 August 2023 to this Office under the *Freedom of Information Act 1982* (FOI Act) for access to documents in the following terms:

> *Part A*
>
> *[35] Under the Freedom of Information Act 1982(Cth), I request access to the "advice" sought "from the APSC in its capacity as the agency with policy responsibility in this area" effectively providing that where a candidate for a role in the Australian Public Service does not have the essential qualifications and experience for a role but "signals", in a job application, that he or she may soon attain the qualifications and build up the relevant experience, members of a selection committee who select the candidate without the essential qualifications and experience ahead of dozens of candidates who do, in fact, meet the essential qualifications and experience for the role at the time the selection decision is made will not contravene their legislative duty to at all times behave in a way that upholds the APS Employment Principles enshrined in section 10A of the Public Service Act 1999 (Cth) (especially the merit selection principles articulated in subsection 10A(2) of the Public Service Act 1999 (Cth)): see Public Service Act 1999(Cth), s 13(11)(a).*
>
> *Part B*
>
> *[36] Under the Freedom of Information Act 1982(Cth), I request access to any and all documents (including, but not limited to, policy documents, policy guidance, guidelines, directions, instructions issued by Commissioners etc) recording that it is permissible for a member of a selection committee for a role in the Australian Public Service to provide one of the candidates for a role, who has not attained the essential qualifications or experience for that role, with a contract of employment 28 days before the selection process has even been finalised.*

Decision

I am an officer authorised under s 23 of the FOI Act to make decisions in relation to FOI requests.

I have identified 1 document relevant to your request. I have decided to give access to the document in part.

A schedule setting out my decision in relation to the relevant documents is at **Attachment A**.

My reasons for not giving access to some material are set out at **Attachment B** to this letter.

Review rights

Information about your review rights is at **Attachment C**.

Contacts

You may contact me via email at information.access@ombudsman.gov.au or via telephone on 1300 362 072.

Yours sincerely

Jodie Hanlon
Legal Team

Influencing systemic improvement in public administration

ATTACHMENT B

Reasons for decision – FOI 2023-10086

Material taken into account

In making my decision I had regard to the following:

- the terms of your request
- the content of the document to which you sought access
- consultation response from another, relevant agency
- advice from other, relevant Ombudsman officers
- relevant provisions of the FOI Act
- Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act, available at www.oaic.gov.au (**FOI Guidelines**).

Findings of fact and reasons for decision

Where the schedule at **Attachment A** indicates that an exemption has been applied to part of a document, my findings of fact and reasons for deciding that the exemption provision applies to that part of the document, are set out below.

Conditional exemption – deliberative process documents: s 47C

Section 47C of the FOI Act provides that

> *A document is conditionally exempt if its disclosure under this Act would disclose matter (**deliberative matter**) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:*
> *(a) an agency;*
> *…*

Section 11A of the FOI Act provides that while an agency must give a person access to a document that is conditionally exempt, access may be refused if the document's disclosure would, on balance, be contrary to the public interest.

I have decided that parts of the document that falls within the scope of your request is conditionally exempt on the basis of s 47C. Further, I have decided that disclosure under the FOI Act would be contrary to the public interest.

Deliberative matter

The term 'deliberative matter' is a shorthand term for opinion, advice, recommendation, consultation, and deliberation that is recorded or reflected in a document.[1] Deliberative matter does not include operational information or purely factual material.

[1] FOI Guidelines, [6.63]. See also Wood; Security, Department of Prime Minister and Cabinet (Freedom of information) [2015] AATA 945, [39].

A 'deliberative process' refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes, the process of reflection, for example, upon a particular decision or course of action.[2]

The FOI Guidelines explain that a deliberative process involves the exercise of judgement in developing and making a selection from different options:

> 'The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'.

I have examined the document, and in my view, parts of it contain consultation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency, namely the Office's deliberations and consultations as part of an investigation. Accordingly, parts of the document are conditionally exempt.

Disclosure not in the public interest

In deciding whether or not access should be given to this information on the basis of public interest I have taken a number of matters into account. These matters include the public interest factors for and against disclosure as outlined in the Guidelines, as well as matters specific to our agency's functions and operating environment.

I accept that the following factor favours disclosure:

- Promote the objects of the FOI Act.

However, I also consider the following factors weigh against disclosure:

- Could reasonably be expected to impede the flow of information to a regulatory agency.
- Could reasonably be expected to prejudice the agency's ability to obtain confidential information/similar information in the future.
- Could reasonably be expected to prejudice the conduct of investigations by the Ombudsman.

On balance I give greater weight to the factors against disclosure because the Office's ability to exercise its functions, including conduct its investigations, relies on the trust and candour of other agencies and agencies providing information to assist with the exercise of such functions. The information relates to the Office's deliberation of matters in part of its investigation in the form of questions posed to an agency. The disclosure of such information could reasonably be expected to prejudice the conduct of future investigations. The Office must be able to communicate with individuals and agencies in a way that supports full and frank flow of information to our Office to assist in our investigations. The protection of such information is even more important where it relates to matters concerning Public Interest Disclosures given the secrecy protections afforded in the *Public Interest Disclosure Act 2013.*

Therefore, I have decided that the public interest is best served by withholding this information.

[2] FOI Guidelines, [6.59].

Conditional exemption – certain agency operations: s 47E

Section 47E provides that:

> *A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to,:*
>
> *…*
>
> *(c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or an agency, or*
>
> *(d) have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.*

Would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the agency

As outlined above the information relates to communication from our Office to an agency as part of an investigation. Disclosure of such information could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the agency as it would impede the ability of our Office to conduct its investigations. As an investigative body our Office must be able to maintain confidentiality over our investigations. Disclosure of information could reasonably affect the willingness of people to make complaints to the Office and impede the effective investigation of such complaints though the cooperation of other agencies.

Disclosure not in the public interest

In deciding whether or not access should be given to this information, on the basis that it is in the public interest to do so, I have taken a number of matters into account. These matters include the public interest factors as outlined in the Guidelines, as well as matters particular to our agency's functions and operating environment.

I consider the same factors for and against disclosure as outlined above are relevant and I have decided that the public interest is best served by withholding this information.

Deletion of exempt/irrelevant matter: s 22

Section 22 of the FOI Act allows an agency to delete exempt/irrelevant matter from a document and to provide an applicant with access to an edited copy. The parts of the document redacted under s 22 as irrelevant material relate to matters outside of the scope of your request.

As I have found that parts of the document contain information which is conditionally exempt and irrelevant I have redacted that information accordingly. You will be provided with access to an appropriately edited version of the document.

COMMONWEALTH OMBUDSMAN

Attachment B

Schedule of documents – Freedom of Information Request FOI-2023-10086

Doc No.	Date	Pages/ Folio	Description of Document	Decision on access	Exempt or irrelevant material
1.	4 May 2022	16	Table of answers	***Part release***	Section 22 – Irrelevant material Section 47E - Deliberative process documents Section 47C - Certain agency operations

ATTACHMENT C

REVIEW RIGHTS

Internal review

Under s 54 of the FOI Act, you may apply in writing to our Office for an internal review of my decision. The internal review application must be made within 30 days of the date on which you were notified of my decision.

Where possible, please attach reasons for why you believe review of the decision is necessary. The internal review will be carried out by another Ombudsman officer within 30 days.

If you choose to seek an internal review, you will afterward have a right to apply to the Office of the Australian Information Commissioner (**OAIC**) for a review of the internal review decision.

Review by the Office of the Australian Information Commissioner

Under s 54L of the FOI Act, you may apply to the Office of the OAIC to review my decision. An application for review by the OAIC must be made in writing within 60 days of the decision date, either from the date of this letter or the date of our internal review decision letter. Your request can be lodged in one of the following ways:

- online at oaic.gov.au/about-us/contact-us
- via email to foidr@oaic.gov.au
- by overland mail to GPO Box 5218 Sydney NSW 2001
- in person to Level 2, 175 Pitt Street Sydney NSW

More information about the OAIC review process is available at its website: oaic.gov.au/freedom-of-information/foi-review-process

Complaints to the Office of the Australian Information Commissioner

You may complain to the OAIC about action taken by the Ombudsman in relation to your FOI request.

While there is no particular form required to make a complaint to the OAIC, the complaint should be in writing and set out the reasons for why you are dissatisfied with the way your request was processed. It should also identify the Ombudsman's Office as the agency about which you are complaining.

You may lodge your complaint either:

- online at oaic.gov.au
- by overland mail to GPO Box 5218 Sydney NSW 2001
- by email to enquiries@oaic.gov.au.

s 22 [redacted]

[redacted]

[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]

s 22 [redacted]

[redacted]

		[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]

s 22 [redacted]

[redacted]

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[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
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s 22 [redacted]

[redacted]

[redacted]	[redacted]	[redacted]
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s 22 [redacted]

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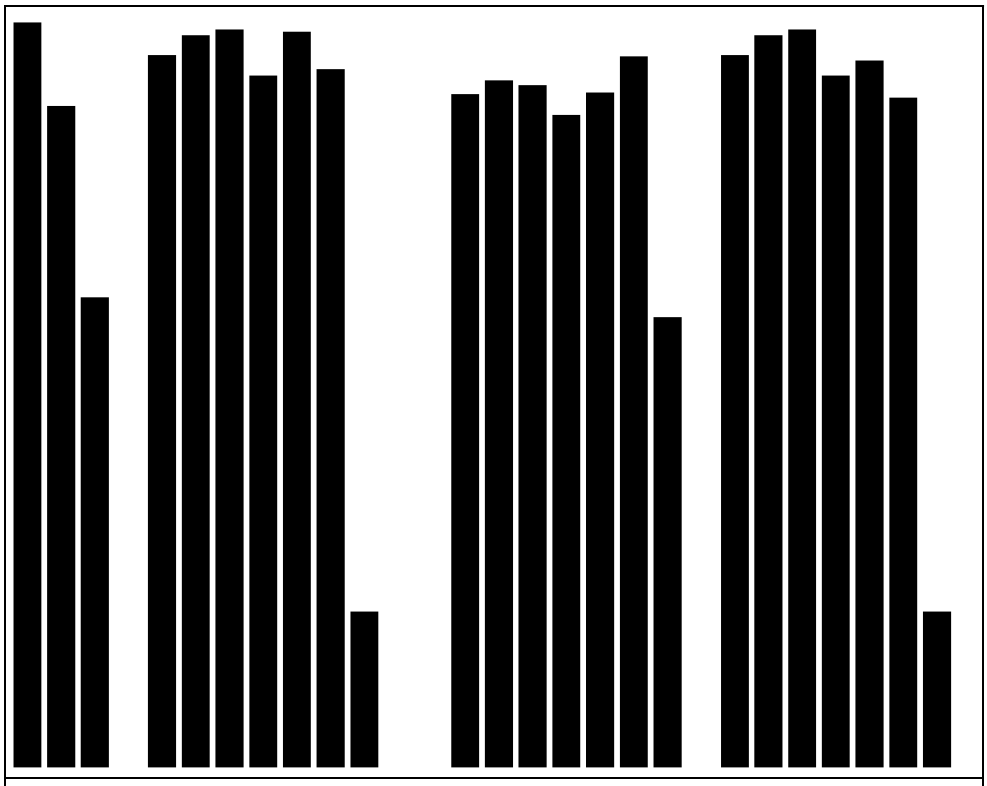
s 22



s 22 [redacted]

[redacted]

		[redacted]
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s 22 [redacted]

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		[redacted]
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s 22 [redacted]

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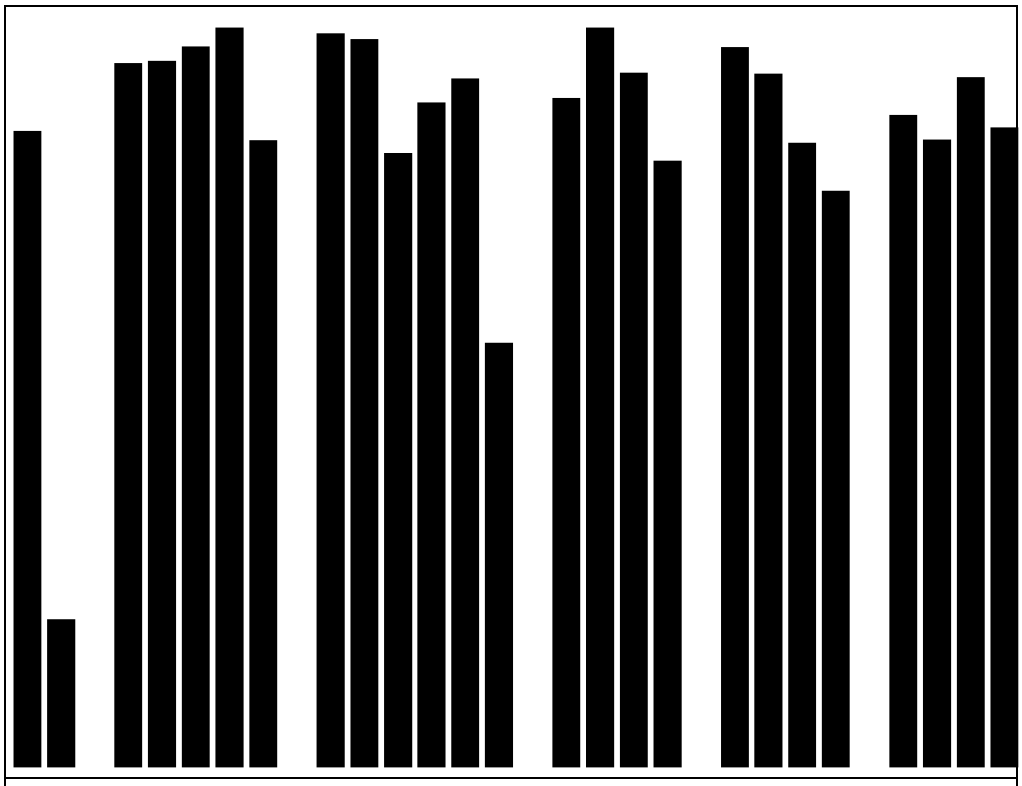
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]

22.	s 22 [redacted], s 47C, s 47E [redacted]	a. Section 10A(2)(c) of the *Public Service Act 1999* requires that the assessment of candidates is based on the candidates work-related qualities and that the work-related qualities are genuinely required to perform the relevant duties. Therefore, it would be expected that candidates are made aware of the requirement for an essential qualification as part of the advertising material. As to the timing of when the qualification must be obtained, this will be determined by the agency. It will come down to the agency's need and what it deems reasonable. Where an agency determines a condition of engagement, the condition must be provided to the person in writing (section 22(6) *Public Service Act 1999*). While not legislated within the *Public Service Act 1999*, Public Service Regulations or Australian Public Service Commissioner's Directions, it would be expected that the requirement would be included in the letter of offer. As examples: - Where citizenship is a requirement, an Agency Head may determine that it is reasonable for a candidate to be engaged within a three month period within which to gain Australian citizenship because the candidate was able to demonstrate that they were near the end of the process and had the expectation of a citizenship ceremony in the near future. - Where a candidate has advised they have completed a required course or qualification but is awaiting for the conferral of the qualification from the University or conferring institution, the

		agency may set the period based on advice from the candidate as to when they expect conferral to occur. The period of time, as to what is reasonable, within which the candidate is to meet the condition of engagement is a decision for the agency. b. As per above, there is no legislative timing requirement. c. Yes. Where the essential criterion can be met by the date of engagement or within a reasonable period as a condition of engagement. Section 22(6) of the *Public Service Act 1999* provides the power to make engagement subject to conditions, as notified to the employee, which includes probation, citizenship, formal qualifications, security and character clearances and health clearances. Admission as a practitioner of the High Court and/or the Supreme Court of a State or Territory would considered a qualification for the purposes of section 22(6) of the *Public Service Act 1999*. This occurs as normal part of the process in Graduate recruitment, as the recruitment and selection process occurs before the completion of the university year including final assessment and having the qualification conferred. Note, section 22(7) also makes clear that the list of the conditions in section 22(6) are not the only conditions of engagement that can be applied.

		Where an agency has set a condition of engagement within a time period, the agency may modify the duties of the role until the required condition is met. The ability to set conditions of engagement provides agencies the flexibility to undertake a recruitment and selection process and make an offer of employment before the final confirmation of the condition of engagement. It permits the agency to make the offer to the most suitable candidate, but with the ability to terminate the engagement if the condition is not met under section 29(3)(f). It is a flexibility that allows agencies to compete, as an employer, for talent against other industries.
s 22	[redacted]	[redacted]

s 22



s 22 [redacted]

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s 22 [redacted]

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s 22 [redacted]

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